BOHARI AMIT

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[CRIMINAL APPEAL NO: 42-6-2005 III]
13 JANUARY 2006

CRIMINAL PROCEDURE: *Sentence - Adequacy - Outraging modesty - Victim aged seven years - Sentenced to 7 years' jail and 3 strokes of the rotan - Whether excessive - Penal Code s. 354*

This was an appeal against the decision of the Sessions Court sentencing the appellant to seven years' jail and three strokes of the rotan for an offence under s. 354 of the Penal Code (outraging modesty of a seven-year old girl by inserting finger into her vagina). It was the appellant's case that the sentence passed was manifestly excessive, considering that he was a first offender and only aged 18 years at the time. It was further alleged that the learned Sessions Court judge ('SCJ') failed to state the reasons for her decision or properly balance the public interest against the interest of the appellant.

Held (allowing the appeal):

[1] The sentencing court must give reasons for its decision. If it does not, it will be assumed that it had not exercised its discretion judicially. (p. 46 d)

[2] Although the SCJ had given consideration to the factors mentioned in the appellant's mitigation before passing sentence, what she did was not enough. She should have stated in more details the reasons for her sentence. As the record stands, this court is uncertain as to whether or not due consideration had been given to the fact that the appellant was a first offender or that he was only 18 years old at the time. This court is therefore constrained to hold that she had not exercised her discretion judicially. (p. 46 e)

[3] Bearing in mind the facts of the case, and the relevant authorities *(Tan Beng Chye v. PP*, *PP v. Emaran Nasir, Kassim Utus v. PP*), the sentence is altered to one of five years' imprisonment and one stroke of the rotan. (p. 48 h)

[Order accordingly]

Case(s) referred to:
Hasanuddin Abd Hamid v. PP [2002] 3 CLJ 495 HC ***(refd)***
Kassim Utus v. PP [2005] 7 CLJ 273 HC ***(refd)***
Kesavan Senderan v. PP [1999] 1 CLJ 343 HC ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
Mohamad Ali v. PP [1956] MLJ 84 ***(refd)***
PP v. Emaran Nasir [1987] 1 MLJ 166 ***(refd)***
PP v. Tanga Muthu [1940] MLJ 40 ***(refd)***
Tan Beng Chye v. PP [1966] 1 MLJ 173 ***(refd)***

Legislation referred to:
Penal Code, ss. 354, 376

For the appellant - M/s Abdul Rahman & Partners
For the respondent - Yong Leou Shin, DPP

Reported by Rose Aziz

JUDGMENT

David Wong Dak Wah JC:
The appellant was tried and convicted by the Kuching Sessions Court on a charge of outraging the modesty of a child under s. 354 of the Penal Code. The initial charge was one of rape under s. 376 of the Penal Code but at the end of the prosecution case, the Sessions Court Judge (SCJ) amended the initial charge to one of outraging the modesty of a seven year old girl on the 29 March 1998 at about 2p.m. in a room at house No 196A, Kpg, Tabuan Hilir, Kuching, in the state of Sarawak by inserting his finger into her vagina and ordered the appellant to enter his defense to the amended charge.

At the end of the case, the appellant was found guilty and sentenced to seven years imprisonment and three strokes of the rotan. He appealed against the conviction and sentence. However when the appeal came before me on 14 December 2005, the appellant withdrew his appeal against conviction and proceeded only on the appeal against the sentence passed by the SCJ on the ground that the sentence was manifestly excessive.

The appellate court's approach in an appeal against sentence is as stated by Richard Malanjum J (as he then was), in the case of *Hasanuddin Abd Hamid v. PP* [2002] 3 CLJ 495 and I quote:

> Now it is settled law that an appellate court is not to interfere with a sentence passed by a trial court unless it is wrong in law or is manifestly excessive or inadequate in the circumstances of the case.

It is also an established practice that the appellate court will not alter a sentence merely because it might pass a different sentence. In dealing with the appeal,

I am of course bound by the principles expounded by Mohamed Azmi SCJ in the case of *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 and I quote:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant ... .

Guided by the above principles, I now consider whether the sentence given by the SCJ is manifestly excessive such that it requires me to interfere with it?

In arguing that the SCJ sentence ought to be revised, the learned counsel for the appellant raised the following grounds:

1. The learned SCJ did not expressly state the grounds on which she based her decision on the sentence passed. On this the learned counsel relied on p. 40 of the Record of Appeal where the SCJ said and I quote:

   > After considering the mitigation of the accused and the Prosecuting Officer's submission, I sentenced the accused to 7 years' imprisonment and 3 strokes of the rotan.

2. The learned SCJ failed to adequately take into consideration of the fact that the appellant was a first offender.

3. The learned SCJ failed to adequately take into consideration of the fact that the appellant was only 18 years old at the time of commission of the crime.

4. The learned SCJ failed to acknowledge that there was no violence involved in the commission of the crime

5. The learned SCJ did not balance the public interest against the interests of the appellant.

With respect to ground 1, to be fair to the SCJ before she handed out her sentence, she did hear what was said in mitigation by the learned counsel for the appellant which were as follows:

> The accused is a first offender. The instruction I received from the accused is to inform the court and the family members of the victim that he has regretted his action. The accused is gainfully employed as a laborer. There was no violence

> involved. Therefore I appeal on behalf of the accused for leniency primarily because the accused especially his parents are very supportive of him. They will ensure that the accused will not make the same mistake again.

Though on the face of the notes of proceedings, the SCJ gave consideration to the factors mentioned in the learned counsel's mitigation but in my view what she did was not enough. She should have stated in more details the reasons for her sentence. In *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* (*supra*), Mohamed Azmi SCJ sets out the duty of the sentencing court. This is what he said:

> A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence

Implicit in what I just quoted, the sentencing court must give reasons for its decision and if it doesn't, it will be assumed that they had not exercised their discretion judicially. As it stands now, I do not know whether or not consideration had been given to the fact that the appellant was a first offender or that he was only 18 years old at the time of commission of the crime. Bereft of reasons from the SCJ, I am constrained to hold that the she did not exercise her discretion judicially.

Accordingly, this is a proper case for the court to interfere with the sentences passed by the SCJ. The next question which I need to consider is, what is the proper punishment to be imposed on the appellant?

In answering that, I shall use the guidelines set out in *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* (*supra*) which requires me firstly to look at the seriousness of the offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

Firstly there cannot be any doubt in anyone's mind that an offence under s. 354 of the Penal Code is a serious offence. Adopting the approach used by learned judge in *Kesavan Senderan v. PP* [1999] 1 CLJ 343, the median starting point to start with would be 40% to 50% of the maximum sentence which in this case is 10 years.

As for the second consideration, the facts of this case are these. After a full trial spanning over a period from 21 March 2003 to 30 September 2005, the appellant was found guilty of outraging the modesty of a seven year old victim

by inserting his finger into her vagina on 29 March 98 at 2p.m. in a room at house no 196A Kpg. Tabuan Hilir, Kuching. During trial the appellant denied his involvement of the act of molestation which as correctly found by the SCJ amounted to a bare denial of the offence. The facts show that there was a dastardly act by the accused on a seven year old victim. The mental damage on the young victim cannot be ignored and must be taken into account in passing sentence. In some jurisdictions, victim's impact statements are given to the court before sentence is passed and in my view rightly so as public interests which the courts so often refer to in passing sentence must include the interests of the victim. In *Kesavan Senderan v. PP* (*supra*), the learned judge had this to say:

> The second consideration comes next. In the event that the circumstances show that the commission of the offence was very much planned, it would warrant a sentence higher than that 40% to 50% of the maximum sentence. So also if the offence is committed against an infant, a child, the weak and defenceless and the old. If the offence was committed accidentally, it would warrant a substantial reduction from that median point.

I come now to the third consideration which concerns whether or not there are any mitigating factors. The question of regrets on the part of the appellant does not arise as he opted for trial of the action. The mitigating factors which may merit consideration are the age of the appellant and that it was a first offence by the appellant.

The final consideration requires me to look at sentences that have been imposed in the past for similar offences. On this aspect learned counsel for the appellant referred to three cases.

The first case is *PP v. Tanga Muthu* [1940] MLJ 40. In this case, Proyser CJ on an appeal enhanced a sentence of a fine of RM50 to one year of rigorous imprisonment for an offence against a six year old victim under s. 354 of the Penal Code. Firstly this court is not aware what one year of rigorous imprisonment entails in 1939? Be that as it may, this case can be distinguished on the ground that it happened in 1939 which is over sixty years ago. However, I fully subscribe to the remarks made by Proyser CJ and they are:

> I regard sexual offences against children as offences which should be severely dealt with. It is true the child in this case suffered no physical injuries, but she may have suffered irreparable moral injuries

The second case is *Tan Beng Chye v. PP* [1966] 1 MLJ 173. The Federal Court on an appeal found the accused guilty of an offence under s. 354 of the Penal Code and sentenced the accused to three years' imprisonment. Again it should be noted that this case happened over thirty years ago and the age of the victim is not known. Hence this case is of no help to this court.

The final case is *PP v. Emaran Bin Nasir* [1987] 1 MLJ 166. In that case, the accused was charged with two offences, one for rape and the other for outraging the modesty of a female. The court sentenced the accused to eight years for the rape and one year for the second offence. The victim was 17 years old while in the present case the victim was only seven years old. Further the accused was simultaneously charged with two offences arising from the same transaction which renders the one year sentence for s. 354 offences not comparable to the case at hand.

The cited cases exemplify the general principle that in passing sentencing, each case must be assessed on its peculiar facts and circumstances.

In the recent case of *Kassim Utus v. PP* [2005] 7 CLJ 273, I had occasion to deal with s. 354 of the Penal Code in an appeal against sentence. There, the accused on his plea of guilt to several charges under s. 354 of the Penal code in different cases was convicted and sentenced for each charge to five years' imprisonment with two strokes of the rotan by the relevant magistrates in Kuching. On appeal by the accused those sentences were upheld by me. Admittedly there were exceptional circumstances in that case as the accused was a habitual offender. That said there was no trial in that case as was here nor does this case involve a habitual offender. As such sentences of five years with two strokes of the rotan provide a useful guideline to me. It should also be noted that the prosecution did not appeal against the sentences passed in those cases which can be inferred that the imposed sentences were appropriate.

I come now to the sentence of whipping of three strokes of rotan meted out by the SCJ. The learned counsel for the appellant submitted that as there was no violence involved in this case, whipping should not be imposed. He cited the case of *Mohamad Ali v. PP* [1956] MLJ 84 which held that the policy of the courts is not to impose sentences of whipping unless the offence has been committed with substantial violence. What is substantial violence? In this case a young lady's body had been trespassed upon in a manner which in my view is worse than physical violence. She had to live through her ordeal as a thirteen year old during the trial and had been so affected that she at one stage of the trial refused to testify. She will have this scar for life and if that is not substantial violence, I don't know what is.

Weighing all the factors mentioned above, I alter the sentence of seven years of imprisonment to five years and the sentence of whipping from three strokes to one stroke of the rotan.